

# SENATE STAFF ANALYSIS AND ECONOMIC IMPACT STATEMENT

(This document is based on the provisions contained in the legislation as of the latest date listed below.)

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Prepared By: Criminal Justice Committee

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BILL: CS/SB 1834

INTRODUCER: Criminal Justice Committee and Senator Baker

SUBJECT: Sexual Predators

DATE: March 22, 2006

REVISED: \_\_\_\_\_

	ANALYST	STAFF DIRECTOR	REFERENCE	ACTION
1.	Erickson	Cannon	CJ	Fav/CS
2.	_____	_____	HE	_____
3.	_____	_____	_____	_____
4.	_____	_____	_____	_____
5.	_____	_____	_____	_____
6.	_____	_____	_____	_____

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## I. Summary:

The bill prohibits a person who is designated a sexual predator under s. 775.21, F.S., from possessing a prescription drug for the purpose of treating erectile dysfunction. The first time the sexual predator possesses the drug for this purpose it is a second degree misdemeanor; subsequent violations are first degree misdemeanors.

This bill creates section 794.075 of the Florida Statutes.

## II. Present Situation:

### Sexual Predators

Section 775.21(4), F.S., provides that an offender is designated as a sexual predator if the offender was convicted of the current offense, the offender committed or attempted to commit the offense on or after October 1, 1993, and the offense is any of the following capital, life, or first-degree felony offenses:

- Kidnapping (s. 787.01, F.S.) or false imprisonment (s. 787.02, F.S.) where the victim is a minor and the defendant is not the victim's parent;
- Sexual battery (ch. 794, F.S.);
- Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age (s. 800.04, F.S.);
- Selling or buying of minors for portrayal in a visual depiction of the minor engaging in sexually explicit conduct (s. 847.0145, F.S.); or
- A violation of a similar law of another jurisdiction.

An offender is also designated as a sexual predator if the offender was convicted of the current offense, the offender committed or attempted to commit the current offense on or after October 1, 1993, the current offense is a qualifying offense, and the offender has a prior qualifying offense. A current qualifying offense is any of the following offenses:

- Kidnapping or false imprisonment where the victim is a minor and the defendant is not the victim's parent;
- Luring or enticing a child where the victim is a minor and the defendant is not the victim's parent (s. 787.025, F.S.);
- Sexual battery (under ch. 794, F.S., but excluding s. 794.011(10), F.S., and s. 794.0235, F.S.);
- Procuring a person under the age of 18 for prostitution (s. 796.03, F.S.);
- Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age;
- Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult (s. 825.1025(2)(b), F.S.);
- Sexual performance by a child (s. 827.071, F.S.);
- Selling or buying of minors for portrayal in a visual depiction engaging in sexually explicit conduct; or
- A violation of a similar law of another jurisdiction.

To qualify as a prior qualifying offense<sup>1</sup> the offender must have previously been convicted of or found to have committed or pled nolo contendere or guilty to, regardless of adjudication, the offense and the offense must be any of the following offenses:

- Kidnapping or false imprisonment where the victim is a minor and the defendant is not the victim's parent;
- Luring or enticing a child where the victim is a minor and the defendant is not the victim's parent;
- Sexual battery on a person less than 12 years of age (s. 794.011(2), F.S.); sexual battery on a person 12 years of age or older with threat of deadly weapon or physical force (s. 794.011(3), F.S.), under various circumstances (s. 794.011(4), F.S.), or without physical force or violence likely to cause serious personal injury (s. 794.011(5), F.S.); or soliciting a person less than 18 years of age to engage in sexual battery or committing sexual battery upon a person less than 12 years of age, if the person soliciting or engaging in the sexual battery is in a position of familial or custodial authority over the person;
- Unlawful sexual activity with certain minors (s. 794.05, F.S.);
- Procuring a person less than 18 years of age for prostitution (s. 796.03, F.S.);
- Lewd/lascivious offenses committed upon or in the presence of a person less than 16 years of age;

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<sup>1</sup> A prior qualifying offense must also be a felony that resulted in a conviction sentenced separately, or an adjudication of delinquency entered separately, prior to the current offense and sentenced or adjudicated separately from any other felony conviction that is to be counted as a prior felony. If the offender's prior enumerated felony was committed more than 10 years before the primary offense, it is not considered a prior if the offender has not been convicted of any other crime for a period of 10 consecutive years from the most recent date of release from confinement, supervision, or sanction, whichever is later. s. 775.21(4)(b), F.S.

- Lewd/lascivious offenses committed upon or in the presence of an elderly person or disabled adult;
- Providing obscene material to a minor (s. 847.0133, F.S.);
- Computer pornography (s. 847.0135, F.S.);
- Selling or buying of minors for portrayal in a visual depiction of the minor engaging in sexually explicit conduct; or
- A violation of a similar law of another jurisdiction.

An offender is also designated as a sexual predator if the offender has been determined to be a sexually violent predator pursuant to a civil commitment proceeding under ch. 394, F.S.

Section 775.21, F.S., contains numerous registration requirements for persons who meet the definition of “sexual predator” under s. 775.21(4), F.S. These requirements apply to sexual predators in *or not in* the custody or control of, or under the supervision of, the Department of Corrections, or in the custody of a private correctional facility. They also apply to sexual predators who are under federal supervision, who are in the custody of a local jail, or who are designated a sexual predator (or another, similar designation) in another state and establish or maintain a residence in this state, or are enrolled, employed, or carrying on a vocation at an institution of higher education in this state. Extensive procedures are also provided for notifying communities about certain information relating to sexual predators, much of which is compiled during the registration process.

A sexual predator who has been convicted of one of a list of enumerated offenses when the victim of the offense was a minor is prohibited from working or volunteering at any business, school, day care center, park, playground, or other place where children regularly congregate. There are also a number of penalties for the sexual predator’s failure to comply with registration requirements and other requirements of the section.

### **Erectile Dysfunction (ED)**

The term erectile dysfunction (ED) covers a range of disorders, but usually refers to the inability to obtain an adequate erection for satisfactory sexual activity.<sup>2</sup> According to the Department of Health (DOH), some drugs for treating ED must be obtained by prescription while others (e.g. herbal remedies, etc.) may be obtained over-the-counter without a prescription.

Three orally-administered prescription drugs are frequently prescribed for the treatment of ED: Sildenafil (Viagra®); Tadalafil (Cialis®); and Vardenafil (Levitra®). The Mayo Clinic has described how these drugs are used in the treatment of ED:

The Food and Drug Administration (FDA) approved Viagra in 1998, and it became the first oral medication for erectile dysfunction on the market. Since then, Levitra and Cialis have been approved, providing more options for oral therapy.

Viagra, Levitra and Cialis work in much the same way. Chemically known as phosphodiesterase inhibitors, these drugs enhance the effects of nitric oxide, a chemical messenger that relaxes smooth muscles in the penis. This increases the amount of blood

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<sup>2</sup> <http://www.mayoclinic.com/health/erectile-dysfunction/DS00162>

and allows a natural sequence to occur — an erection in response to sexual stimulation. These medications don't automatically produce an erection. Instead they allow an erection to occur after physical and psychological stimulation. Many men experience improvement in erectile function after taking these medications regardless of the cause of their impotence.

These medications share many similarities, but they have differences as well. They vary in dosage, duration of effectiveness and possible side effects. Other distinctions — for example, which drug is best for certain types of men — aren't yet known. No study has directly compared these three medications.<sup>3</sup>

There are other treatment options than these drugs, which may be used in some cases: needle-injection therapy and self-administered intraurethral therapy (the Mayo Clinic states that other drugs, such as papaverine and phentolamine, may be used in needle-injection therapy); testosterone replacement therapy (if there is a testosterone deficiency); vacuum devices; vascular surgery; penile implants; and psychological counseling.<sup>4</sup>

Currently, there do not appear to be any statutory provisions limiting or prohibiting a specific group of persons from possessing a prescription drug for the purpose of treating ED, if that drug has been legally prescribed to such persons.<sup>5</sup>

### III. Effect of Proposed Changes:

The bill prohibits a person who is designated a sexual predator under s. 775.21, F.S., from possessing a prescription drug for the purpose of treating erectile dysfunction (ED). The first time the sexual predator possesses the drug for this purpose it is a second degree misdemeanor; subsequent violations are first degree misdemeanors.

The bill defines the term “prescription drug “ by reference to s. 499.003(25), F.S. Section 499.003(25), F.S., defines a “prescription drug” as any drug, including, but not limited to, finished dosage forms, or active ingredients subject to, defined by, or described by s. 503(b) of the Federal Food, Drug, and Cosmetic Act or s. 465.003(8), F.S. (defining “medicinal drugs” or “drugs”), s. 499.007(12), F.S. (providing a criterion for determining that a drug or device is misbranded), or s. 499.0122(1)(b) or (c), F.S.(defining, respectively, the terms “prescription medical oxygen” and “veterinary legend drug”).<sup>6</sup>

The bill takes effect on October 1, 2006.

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<sup>3</sup> <http://www.mayoclinic.com/health/erectile-dysfunction/DS00162/DSECTION=7>

<sup>4</sup> *Id.*

<sup>5</sup> Section 409.912(39)(a)9., F.S., applicable to Medicaid recipients, limits dosages of drugs treating ED. Additionally, in 2005, Alan Levine, Secretary of the Agency For Health Care Administration, announced: “Florida’s Medicaid program will now discontinue coverage of lifestyle enhancing drugs for sexual performance for all participants and will seek to amend the state’s plan with the Centers for Medicare and Medicaid Services. We will, however, continue to provide Viagra to the relatively few Medicaid participants, primarily women, who are prescribed it for the treatment of Primary Pulmonary Hypertension (PPH), a potentially life threatening condition.” “Statement From Agency For Health Care Administration Secretary Alan Levine Regarding Sexual Performance Prescription Drugs” (Press Release), Agency For Health Care Administration (May 24, 2005).

<sup>6</sup> This definition does not include over-the-counter drugs that may treat ED, such as herbal remedies.

The bill imposes criminal liability on a sexual predator for possessing a drug that he or she can obtain pursuant to a legal prescription if the sexual predator possesses the drug for the purpose of treating ED. The bill's proscription and penalty apply to *all* sexual predators who possess the prescription drug for this purpose, whether they are serving a sentence and are under custody or control of, or under the supervision of the Department of Corrections and under the jurisdiction of the sentencing court, or they are not serving a sentence. While some prescription medications are controlled substances and public safety considerations have been recognized for regulating and restricting how these drugs are prescribed and obtained, persons not serving a sentence do not appear to be subject to criminal penalties for possessing these drugs pursuant to a legal prescription.

The bill's proscription and penalty do not appear to apply to a sexual predator's possession of a prescription drug for treating ED if the possession is not for the purpose of treating ED. Some drugs for treating ED are or may be used in the treatment of other conditions. *The Seattle Times* reported in October of 2005, that tadalafil, which is the generic name for Cialis®, an erectile dysfunction drug, is undergoing clinical trials for the treatment of symptoms of "benign prostatic hyperplasia (BPH), a condition found in more than half of men over 50." The newspaper also reported that Lilly Icos, which produces Cialis®, is "studying the effects of tadalafil in patients with pulmonary arterial hypertension." The Secretary of the Agency for Health Care Administration has noted that Viagra is sometimes used "for the treatment of Primary Pulmonary Hypertension (PPH), a potentially life threatening condition."<sup>7</sup> The use or potential use of Viagra to treat conditions other than ED, such as certain cardiac conditions (hypertension, enlarged heart, etc.) and Crohn's disease has been publicly reported.<sup>8</sup>

Staff is unaware of any state law that imposes criminal penalties on a person not under a sentence for possessing a prescription drug that has been legally prescribed to that person. Additionally, staff was unable to find any legal case, law review article, or medical journal article regarding legal, medical, or ethical issues that may have been raised about a similar drug possession offense. Arguably, the closest possession offense, though not a drug possession offense, may be possession of a firearm by a convicted felon. This is somewhat akin to the drug possession offense in the bill, at least in its approach.

If the bill were to become law it might prevent some men from committing sexual battery or lewd battery, if the battery was the result of penetration of the sexual organs by a penis that became erect by means of a prescription drug for treating ED. However, a man may not be impotent in all circumstances; he may take a drug (prescription or otherwise) for treating ED in order to increase the frequency of erections. Therefore, even if a sexual predator cannot possess a prescription drug for the purpose of treating ED, this does not necessarily mean he will be unable to achieve an erection. Further, a sexual predator is not proscribed by the bill from possessing

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<sup>7</sup> See Note 5. The Secretary stated that the discontinuation of Medicaid/Medicare funding for "lifestyle enhancing drugs for sexual performance" would not extend to Viagra treatment for PPH.

<sup>8</sup> "Viagra may offer help for enlarged hearts", <http://www.msnbc.msn.com/id/6858619/>; "Viagra may treat heart failure"; <http://www.medicinenet.com/script/main/art.asp?articlekey=55034>; "Viagra may help Crohn's disease," <http://www.webmd.com/content/article/119/113246>; "Viagra reduces heart stress," [http://www.nelh.nhs.uk/hth/viagra\\_heart\\_stress.asp](http://www.nelh.nhs.uk/hth/viagra_heart_stress.asp).

over-the-counter drugs for the treatment of ED or from seeking non-drug therapies for the treatment of ED, such as a penile implant. Also, sexual battery or lewd battery is not accomplished simply by means of penetration by a penis. Section 794.011(1)(h), F.S., defines “sexual battery” as “oral, anal, or vaginal penetration by, or union with, the sexual organ of another or the anal or vaginal penetration of another by any other object...” This definition is the same as the definition of “sexual activity” in s. 800.04(1)(a), F.S., for the purpose of lewd battery.

While it appears likely that many sexual predators are designated as such as a result of a conviction for sexual battery or lewd battery, not all of the offenses listed in s. 775.021, F.S., as qualifying offenses for purposes of the designation necessarily involve actual physical contact with the victim. For example a person could be designated a sexual predator based upon committing the offense of selling a minor for portrayal in a visual depiction of the minor engaging in sexually explicit conduct. The sexual predator may not have been engaged in the sexually explicit conduct that was visually depicted, and therefore, may not have had any actual physical contact with the victim.

Prescription drugs for treating ED may be obtained in the privacy of a person’s home via the Internet (often without any “prescription,” as most people would construe that term) or surreptitiously via diversion. The availability of these drugs over the Internet and by means of diversion suggest that sexual predators who want these drugs will find them, and if they are willing to find them they are willing to take the risk of punishment. (If a sexual predator is taking the drug to achieve an erection to commit a sexual battery, a high felony offense, it is unlikely he is going to be concerned about committing a misdemeanor for possessing the drug.)

#### **IV. Constitutional Issues:**

**A. Municipality/County Mandates Restrictions:**

None.

**B. Public Records/Open Meetings Issues:**

None.

**C. Trust Funds Restrictions:**

None.

**D. Other Constitutional Issues:**

There does not appear to be any case regarding an offense similar to the drug possession offense created by the bill. Therefore, there appears to be no case precedent to suggest or indicate what constitutional issues, if any, could be raised regarding the bill.

**V. Economic Impact and Fiscal Note:****A. Tax/Fee Issues:**

None.

**B. Private Sector Impact:**

None.

**C. Government Sector Impact:**

The bill will not have any prison bed impact because it creates misdemeanor offenses. Misdemeanor offenses are not punishable by a state prison sentence. It is possible that the bill could have some impact, likely negligible, on jails, if some of these cases results in jail time.

**VI. Technical Deficiencies:**

None.

**VII. Related Issues:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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## **VIII. Summary of Amendments:**

None.

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This Senate staff analysis does not reflect the intent or official position of the bill's introducer or the Florida Senate.

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